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No. 06-211

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MARC ROTENBERG
Counsel of Record
SHERWIN SIY
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009
(202) 483-1140

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INTEREST OF AMICUS CURIAE[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as amicus curiae in several privacy cases before this Court, including *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*; 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); and *Reno v. Condon*, 528 U.S. 141 (2000). EPIC has also participated in this case as amicus before the Ninth Circuit.

Unpublished, secret laws undermine the very essence of self-government. Central to the American form of government has been a longstanding commitment to public trials and to openness in government decisionmaking.[2] "Publication of the law militates against the plea of ignorance, provides a practical

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[1] This brief *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for Petitioner and Respondent have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Law school students participating in the EPIC Internet Public Interest Opportunities Program (IPIOP) Courtney Anne Barclay and Jay Tamboli assisted in the preparation of this brief.

[2] *See, e.g.*, THE FEDERALIST No. 49 (James Madison).

refutation of such a defense, and otherwise constitutes a foundation stone of the self-government edifice."[3]

In this case, the government refuses to disclose the text of a regulation compelling air travelers to present identification. A generally applicable law or regulation that is not disclosed to the public it regulates violates due process, creating the potential for uncertainty and abuse of discretion. Such a regulation is also void for vagueness. Furthermore, the Transportation Security Administration's classification of the regulation as "sensitive security information" is counter to, and fails to serve the purposes of, the law that authorizes such classification.

ARGUMENT

I. The Identification Directive Creates A Secret Law Applicable to the General Public, Which Violates Due Process

The secret identification directive acts as a legal obligation that directly affects millions of travelers while providing no public notice or allowing for the traditional checks on arbitrary or prejudicial enforcement. Secret law has long been anathema to the government,[4] with statutes such as the Freedom of Information Act and the Federal Register Act designed to combat this very problem. In enacting the Freedom of Information Act, for example, Congress intended to "establish a general philosophy of full

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[3] Harold C. Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97, 97 (1988).

[4] "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors." *New York Times v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

agency disclosure" since "[a] government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."[5]

Many of the well-understood problems of secret law are present in the case at hand. The TSA Security Directive ("TSA Directive") is an order that regulates the conduct of anyone who needs or plans to commute by commercial airline, and is therefore an agency regulation that, in the absence of public disclosure, violates constitutional due process. Under 49 U.S.C. § 114(s), the TSA may develop regulations "prohibiting the disclosure of information obtained or developed in carrying out security" if disclosing the information would "be detrimental to the security of [air] transportation."[6] The 2002 Homeland Security Act further expanded this agency authority to withhold information on the grounds that its disclosure would be detrimental to the safety of people engaging in general transportation.[7]

In *Public Citizen, Inc. v. FAA*, the D.C. Circuit determined that Congress intended that the FAA (and by extension, the TSA) have authority to promulgate secret rules that are security-sensitive pursuant to 49 U.S.C. app. § 1357(d)(2), which has since been amended and recodified at 49 U.S.C. § 40119 (b)(1).[8] In the notice of proposed rulemaking on minimal staffing levels and minimal training requirements for new employees, the FAA withheld

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[5] S. Rep. No. 89-813 (1966).

[6] *Gordon v. FBI*, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004); *see also Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 193 (D.C. Cir. 1993).

[7] *See Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 610 n.1 (N.D. Cal. 2004).

[8] 988 F.2d at 188-89.

instructions tailored to the particular needs of each airport and air carrier. The FAA claimed that secrecy of the staffing and training instructions was necessary to maintain the integrity of airport security procedures. The D.C. Circuit rejected the plaintiff's argument that the secret rules violated the notice-and-comment and publication requirements of the Administrative Procedures Act, and the Freedom of Information Act respectively.

There is a pivotal difference between the agency rules at issue in *Public Citizen* and *Gilmore*. While *Public Citizen*'s secret rule impacts internal agency practices, *Gilmore*'s rule stretches beyond the agency to regulate the conduct of anyone who has or who could potentially travel by commercial airlines.[9] The Ninth Circuit agreed that the Directive 'imposes an obligation' by requiring airline passengers to present identification or be a 'selectee' . . ."[10] However, the Ninth Circuit used commercial-centric language, such as the TSA Directive having a "'direct and immediate' effect on the daily business of the party asserting wrongdoing [the airline]" and that "aircraft operators . . . are required to maintain approved security programs [that] must comply with each Security Directive issued to the aircraft operator by the TSA . . ."[11] This indicates that the Ninth Circuit incorrectly construed the TSA Directive as primarily regulating airline businesses.

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[9] *Cf. Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (explaining that material that was "designed to establish rules and practices for agency personnel and . . . involved no 'secret law' of the agency" could be withheld).

[10] *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006).

[11] *Gilmore*, 435 F.3d at 1133.

The TSA Directive is properly considered a "secret law," which *Hardy v. Bureau of Alcohol, Tobacco, and Firearms* defines as "information withheld from the public which defines the legal standards by which the public's conduct is regulated."[12] Through orders issued to airlines to implement identification programs, the TSA Directive regulates the conduct of the general public – which is comprised of people who currently travel by commercial flight, as well as those who could contemplate travel in such a manner. The Ninth Circuit suggested that "those who, like Gilmore, refuse to comply with the identification policy"[13] are likely to pursue other options, such as traveling by train or driving, to exercise their right to interstate travel. Put plainly, the Ninth Circuit recognized that the TSA Directive creates a strong disincentive for the public to use the most common form of modern cross-country travel – commercial flight – and that the public will modify their behavior when faced with this secret rule. A secret rule that creates such substantial deterrents to a routine public activity and that forces people to modify their behavior by either complying with its terms or seeking alternate routes (in the present or future) is a regulation of public conduct. The rule deters individuals who are concerned about surrendering their identification or surrendering their body and belongings to an extensive and invasive search from attempting air travel again, since they will not know what liberties are permitted under the terms of the regulation.

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[12] *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980).
[13] *Gilmore*, 435 F.3d at 1133.

Agency rules that coerce actions of the public and that are not published, are inconsistent with due process. Due process is violated even where disclosure of such rules would adversely affect transportation safety. Thus, withholding information about the TSA Directive – information that defines the legal standards by which the public is regulated – raises due process concerns.

II. Laws Withheld from the Public Require Even Stricter Scrutiny than Vague Laws

The same values that are offended by vague laws are violated to an even greater extent by laws that are hidden from the public. In either case, members of the public are denied both a reasonable opportunity to comply with the law, and the assurance that they will not be subject to arbitrary or discriminatory enforcement of the laws. However, in the case of a vague law, the public has at least the ability to examine the language of the statute and make its case to the judiciary that the language does not pass constitutional muster. The individual can likewise compare the language of the statute to its application in her particular case. An individual cannot adequately challenge a law invisible to public oversight if he cannot ever read that law himself and present to a fact-finder how it has been misapplied. Even if a court can review the language *in camera*, only one party to the suit is capable of presenting its case in an adversarial setting. Because of these considerations, a law withheld from public scrutiny that impacts millions of Americans should not be permitted.

A. The Directive's Secrecy Denies Individuals a Reasonable Opportunity to Comply with the Law

In order to satisfy due process, a law must be sufficiently clear to provide individuals with a reasonable opportunity to comply with the law. Airline personnel gave directly contradictory statements about the secret TSA Directive at each encounter with Gilmore.

> On July 4, 2002 . . . [Gilmore] attempted to fly from Oakland International Airport to Baltimore-Washington International Airport on a Southwest Airlines flight . . . .
> [T]he [Southwest ticket counter] clerk informed Gilmore that identification was required . . . . Gilmore asked whether the requirement was a government or Southwest rule, and whether there was any way that he could board the plane without presenting his identification. The clerk was unsure, but posited that the rule was an "FAA security requirement." The clerk informed Gilmore that he could opt to be screened at the gate in lieu of presenting the requisite identification . . . . At the gate, Gilmore again refused to show identification. In response to his question about the source of the identification rule, a Southwest employee stated that it was a government law. Gilmore then met with a Southwest customer service supervisor, who told him that the identification requirement was an airline policy . . . .
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> That same day, Gilmore went to San Francisco International Airport and attempted to buy a ticket for a United Airlines flight to Washington, D.C. While at the ticket counter, Gilmore saw a sign that read: "PASSENGERS MUST PRESENT

> IDENTIFICATION UPON INITIAL CHECK-IN" . . . . The [ticket counter] agent told him that he had to show identification at the ticket counter, security checkpoint, and before boarding; and that there was no way to circumvent the identification policy. A United Airlines Service Director told Gilmore that a United traveler without identification is subject to secondary screening, but did not disclose the source of the identification policy. United's Ground Security Chief reiterated the need for identification, but also did not cite the source of the policy. The Security Chief informed Gilmore that he could fly without presenting identification by undergoing a more intensive search . . . [that] include[d] walking through a magnetometer, being subjected to a handheld magnetometer scan, having a light body patdown, removing [his] shoes, and having [his] carry-on baggage searched by hand and a CAT-scan machine . . . .[14]

In other words, Gilmore was informed that there was a rule which might be either a government rule or an airline policy; which either did or did not require him to show identification – which was required either at the check-in counter, at the gate, at a security checkpoint, or at some combination of those locations; and which either did or did not give him the option to choose a secondary screening search instead. Contrary to the Ninth Circuit's assertion,

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[14] *Gilmore*, 435 F.3d at 1130.

notice to the public as to what conduct was required, and by whom, was defective.[15]

B. The Directive's Secrecy Prevents Meaningful Review and Allows for Arbitrary Enforcement

The secrecy shrouding the TSA Directive shields responsible parties from being held accountable for the effects of the regulation on members of the public. Courts have a clear role in providing meaningful judicial review of executive action, and a functional checks-and-balance system requires more than agency assertions of legality and due process. This Court recognized in *Hamdi v. Rumsfeld* that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."[16] Meaningful judicial review is necessary even in an era of international conflict and sustained threats to national security – for how is one to seek redress for improperly applied regulations if one cannot have the restrictions imposed independently reviewed?

After conducting an *in camera* examination of the Directive, the Ninth Circuit concluded that because "the Directive articulates clear standards . . . [and] notifies airline security personnel of the identification requirement and gives them detailed instructions on how to implement the policy[,] . . . [and] because all passengers must comply with the identification policy, the policy does not raise concerns of arbitrary application."[17] However, even if the instructions are

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[15] *Gilmore*, 435 F.3d at 1153.
[16] 542 U.S. 507, 530 (2004).
[17] *Gilmore*, 435 F.3d at 1136.

clear, their application may not be. The problems of arbitrary enforcement are not found in the potential confusion of law enforcement, but in the threat that law enforcement may abuse its powers behind the shield of a law: "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a 'standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[18] Whether the pretext for an officer's predilections rests in the possible interpretations of a vague statute, or within a set of regulations that an individual cannot view in order to challenge its application, the harm is still present.

Discrepancies in the implementation of the identification policy are likely to exist in spite of detailed instructions. The customized nature of the TSA orders (tailored to address the needs of each airport and air carrier) means that implementation procedures already vary. Compounded with the multiple possible interpretations of words used in the instructions in the orders, the application of the identification policy will be anything but uniform as applied to all airports and air carriers. This is exacerbated by the fact that the Directive is enforced not only by numerous public employees and law enforcement in their official capacities, but also by private airline employees numbering in the hundreds of thousands.[19] The secrecy attached to the

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[18] *Kolender v. Lawson, 461 U.S. 352, 357 (1983).* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

[19] According to the U.S. Department of Labor's Bureau of Labor Statistics, there were over 160, 000 workers in these jobs in 2005. *See* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Employment Statistics, *Reservation and*

orders frustrates the individual's attempt to differentiate between whether his liberties are being compromised by improper or arbitrary implementation of the TSA orders or by valid regulation, and to seek redress accordingly.

Multiple interpretations of the policy are not purely theoretical, either. As noted above, Gilmore received multiple contradictory statements as to what was required and permitted under the policy. Assuming that the policy allows any traveler to forgo providing identification in lieu of selectee screening, for instance, an agent refusing this option to all members of a minority race, for instance, would come under no scrutiny by the public, or the courts. So long as individuals are unable to view the policy, no one individual subject to arbitrary, prejudicial, or biased enforcement of the Directive would be able to tell if she was afforded disparate treatment.

III. The Security Directive Containing an Identification Requirement is Void for Vagueness

The Ninth Circuit rejected Gilmore's vagueness challenge on three grounds: (1) the TSA Directive does not impose any criminal sanctions; (2) Gilmore had actual notice of the TSA Directive; and (3) the TSA Directive articulates clear standards. However, case law does not completely limit application of the void-for-vagueness doctrine to penal statutes; Gilmore did not have actual notice of the TSA Directive; and although the TSA Directive might articulate a

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Transportation Ticket Agents and Travel Clerks, May 24, 2006, http://www.bls.gov/oes/current/oes434181.htm.

clear standard, that standard is unknown to the parties charged with enforcement.

A. Case Law Does Not Limit Application of the Void-for-Vagueness Doctrine to Penal Statutes

Although John Gilmore was penalized for non-compliance with the TSA Directive, the Ninth Circuit decided that because his penalty "simply prevents... [him] from boarding commercial flights" the void-for-vagueness doctrine did not apply.[20] The Ninth Circuit reached this decision by considering and distinguishing only one aspect of one of several cases presented by the plaintiff in support of vagueness.[21] Thus, this determination was based on an incomplete analysis of case law.

In his opening brief to the Ninth Circuit, Gilmore argues that the TSA Directive violates the Due Process clause of the U.S. Constitution because the unpublished nature of the TSA Security Directive renders it overly vague.[22] To support his argument, Gilmore cites *Kolender*, a case in which the Court held that a California statute was unconstitutional because the law was not drafted with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[23] The Ninth Circuit, however, dismissed the argument stating, "the

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[20] *Gilmore*, 435 F.3d at 1135.

[21] *Id.*

[22] Brief of Petitioner-Appellant at 40, *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), *available at* http://papersplease.org/gilmore/_dl/Gilmore%20v.%20Ashcroft%208.16.04.pdf.

[23] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Supreme Court stated that this doctrine 'requires that a *penal statute* define the criminal offense with sufficient definiteness that....'"[24] The Ninth Circuit added emphasis to "penal statute" and used that phrase to differentiate *Kolender* from Gilmore's claim.[25]

This differentiation, however, is erroneous. In the *Kolender* decision, Justice O'Connor summarized the Court's vagueness jurisprudence as permitting "a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct'" adding "where a statute imposes criminal penalties, the standard of certainty is higher."[26] The *Kolender* decision does not require a challenge to a criminal statute; in fact the *Kolender* decision recognizes the possibility of a vagueness challenge to a non-criminal regulation, rule, or order as Gilmore has done here.

In addition to *Kolender*, Gilmore cited *Hoffman Estates v. Flipside*, which dealt with a licensing ordinance that the Court described only as "quasi-criminal."[27] This Court has also applied the void-for-vagueness doctrine in a number of cases where civil penalties were at issue.[28]

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[24] *Gilmore*, 435 F.3d at 1135 (citing *Kolender*, 461 U.S. at 357 (emphasis added in *Gilmore*)).

[25] *Id.*

[26] *Kolender*, 461 U.S. at 358 n.8 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) and *Winters v. New York*, 333 U.S. 507 (1948)). In a void-for-vagueness claim, a differentiation between penal and civil statutes only impacts the standard by which a facial review is conducted. *Id.* Thus, while slightly more vagueness might be allowed in a civil, rather than criminal statute, civil statutes must still be reviewed for vagueness and voided if they are too indefinite.

[27] 455 U.S. 489, 499 (1982).

[28] *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (concerning assessment of fees against a defendant) ("So here this

B. John Gilmore Did Not Have Actual Notice of the TSA Directive

John Gilmore cannot be said to have actual notice of the TSA Directive. At best, Gilmore was given incomplete notice of a regulation, rule, or order with a reference that the requirement was either a "government law" or "airline policy."[29] The Ninth Circuit determined that Gilmore had actual notice because several airline personnel informed him of an identification policy required to board the plane.[30] In addition, the Ninth Circuit found that a sign in front of a ticket counter was sufficient notice of the TSA Directive to constitute notice to Gilmore.[31] However, this determination by the Ninth Circuit is based on an incomplete analysis of the facts. As seen above, Gilmore was given a number of differing statements of the rule, including the source of the directive, the location at which he had to present identification, and what alternatives were available to the identification policy.

Gilmore might have had some notice of an identification and/or search requirement, but the various interpretations and sources of the requirement cannot be construed to constitute actual notice. The Ninth Circuit's conclusion that Gilmore had adequate notice is based on an incomplete factual analysis.

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state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague."); *see also Bankers Life & Casualty v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J, with Scalia,, J., concurring) (applying the doctrine to punitive damages).

[29] *Gilmore*, 435 F.3d at 1130.

[30] *Id.* at 1135.

[31] *Id.* at 1136.

C. Even if the TSA Directive Articulates a Clear Standard, That Standard is Unknown to the Parties Charged with Its Enforcement

It is clear from the Ninth Circuit opinion that there exists a TSA Directive requiring a traveler to present government-issued identification before entering the gate area of an airport or boarding a plane.[32] However, it is also clear based on John Gilmore's experience that the airline agents charged with enforcement are either unaware of the standards set forth in the TSA Directive or were deliberately misleading Gilmore as to the specifics of that Directive.

The Ninth Circuit determined after its in camera review of the TSA Directive that the Directive "provides a 'definitive statement' of TSA's position by detailing the policy and the procedures."[33] However, in practice, the policy and procedures are not definitive and are applied in an unexpected and inconsistent manner. Many of those individuals charged with enforcing the policy could not even accurately state its terms. For this reason, it is clear that this undisclosed law enforced against the general public cannot survive a void-for-vagueness claim.

Unless the secrecy masking this rule is lifted, we risk living in an increasingly Kafka-esque world, where "[i]t is not necessary to accept everything as true, [but rather] one must only accept it as necessary."[34]

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[32] *Id.* at 1133.

[33] *Id.*

[34] FRANZ KAFKA, THE TRIAL (1925).

IV. Withholding the Text of the Directive From Those it Regulates is Contrary to the Statutory Intent of the Aviation and Transportation Security Act

The identification requirement is withheld from Gilmore and the public because of its classification as "sensitive security information" ("SSI"). Under the Aviation and Transportation Security Act, the TSA is authorized to withhold from public disclosure if "the Under Secretary decides that disclosing the information would--(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential information or financial information; or (C) be detrimental to the security of transportation."[35] Regulations promulgated by TSA under this statute withhold a broad range of information, including not only the categories of information specified by statute, but also adding several new ones.[36] The added categories include security directives issued under 49 C.F.R. § 1542.303. Not only does this inclusion expand the definition of SSI beyond its original statutory boundaries, withholding the identification requirement fails to meet any of the stated statutory requirements for information to be classified as SSI.

Revealing the text of the directive that requires passengers to present identification obviously does not disclose either private information, nor does it reveal trade secrets. Nor, notably, is it at all detrimental to the security of transportation. As the Ninth Circuit noted, the essentials of the requirement are known to all--that passengers must

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[35] 49 U.S.C. § 114(s)(1).
[36] 49 C.F.R. § 1520.5.

display identification.[37] In fact, it is fully necessary for the public to be aware of this demand. Allowing the public to see the specific text that authorizes the requirement does not reveal any of the sensitive information contemplated actually listed by TSA in its regulations.[38]

Nor would revealing the policy provide potential terrorists with the means to circumvent it. According to the Ninth Circuit's *in camera* review, the directive applies to all travelers, giving a potential malefactor no way to game the system, even should the text of the directive, like all generally applicable laws, be available to the public.[39]

The Ninth Circuit gives no reason for the requirement's classification as SSI, other than the agency's sole determination that, as a Security Directive, the requirement should be unseen by the public. Nowhere is there an indication that the government shown how the directive's secrecy at all promotes safety, or how its publication would be detrimental to security. With no obligation to provide even a rudimentary justification, any particular information stylized as a "security directive" could evade public notice and comment, and restrict any potential challenge to its validity or secret status to an *in camera* review at the appellate level. Such a precedent would grant the TSA an impermissible amount of discretion in what it can

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[37] *Gilmore*, 435 F.3d at 1153.

[38] More likely candidates for information that, if revealed, might harm security include vulnerability assessments (49 C.F.R. §1520.5(b)(5)); details of inspections revealing vulnerabilities (49 C.F.R. §1520.5(b)(6)(i)); threat information (49 C.F.R. §1520.5(b)(7)); information regarding screening equipment (49 C.F.R. §1520.5(b)(9)).

[39] *Gilmore*, 435 F.3d at 1154.

withhold from the public. Moreover, it would collapse a fundamental distinction between certain facts, which the government may under some circumstances withhold from public scrutiny, and the legal basis for government action, which if this Court permits an agency to withhold, opens the door to secret law, secret government, arbitrary action, and the use of unaccountable coercive power against millions of Americans in their daily lives.

CONCLUSION

In this case, the government refuses to disclose the text of a regulation compelling air travelers to present identification. A generally applicable law or regulation that is not disclosed to the public it regulates violates due process, creating the potential for uncertainty and abuse of discretion. Such a regulation is also void for vagueness. Furthermore, the Transportation Security Administration's classification of the regulation as "sensitive security information" is counter to, and fails to serve the purposes of, the law that authorizes such classification.

Mr. Gilmore's petition for a writ of certiorari should be granted so that this Court may have the opportunity to review a secret agency rule that offends the Constitution and implicates the rights of millions of American travelers who are presently subject to arbitrary and unaccountable governmental authority.

Respectfully submitted,

MARC ROTENBERG
Counsel of Record

SHERWIN SIY
ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)
1718 Connecticut Ave., NW, Suite 200
Washington, DC 20009
(202) 483-1140

COUNSEL FOR AMICUS CURIAE

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